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AM2015/1 Family & Domestic Violence Clause

Submissions in Response to Background Paper

29 September 2017

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1. On 15 September 2017 the Full Bench issued a Background Paper which posed various questions for the parties to answer.

2. In responding to these questions we are mindful that our previous submissions (filed on 1 September 2017) to a large degree deal with the matters arising. In considering the questions specifically now posed we believe it is important to have particular regard to:

   (a) the majority (Deputy President Gooley and Commissioner Spencer in [2017] FWCFB 3494) had concerns about the ACTU's definition for family and domestic violence;[1]

   (b) the majority expressed the view that the providing of leave for family violence should be limited to dealing with the immediate impact of such violence;[2]

   (c) the majority felt that the Commission should move with caution;[3]

   (d) what is being considered here is the establishment of a fair and relevant minimum safety net of terms and conditions (section 134(1));

   (e) in setting the safety net the Commission is to have regard to the efficient and productive performance of work (section 134(1)(d)) and the taking of any form of leave means an employer either has work undone or is required to source substitute labour to perform the work;

   (f) in setting the safety net the Commission is to have regard to the need to ensure a simple, easy to understand, stable and sustainable modern award system (section 134(1)(g)) and in this regard any clause in a modern award needs to be drafted with sufficient clarity so both the employer and employee can understand their rights and obligations simply; and

   (g) this need for simplicity is likely to be a more important issue in smaller businesses without specialist resources (section 3(g)).

Question 1: Do the elements set out above cover the elements necessary for a model term to give effect to the preliminary views? Are there any additional elements that should be considered for inclusion in a model term?

3. In our previous submissions we effectively identified the matters set out in paragraph 5 of the Background Paper as being the elements for consideration and there are no obvious additional elements required to be given consideration.

Question 2: Are there any other definitions of family and domestic violence that the Commission should consider?

4. As we set out in our previous submissions the question of definition is complex and problematic. It is to some degree aided by articulating the actual activities that the leave may be taken for however this in itself does not resolve the primary definition issue.

5. The two concerns that emerge in relation to definitions are scope and clarity.

[1] [2017] FWCFB 3494 at [112].
[2] [2017] FWCFB 3494 at [114].
[3] [2017] FWCFB 3494 at [99].

6. The fact that various legislatures have adopted varying definitions simply highlights the difficulty of this exercise rather than solving the problem.

7. Ultimately, we are trying to place a complex sociological issue in a black and white rights and obligations context.

8. If we deal first with the question of scope and consider, by way of example, Attachment A, of the Background Paper, the nature of the definition in the ACTU's proposed domestic violence leave clause creates an exceptionally low bar that could include many robust arguments between partners or family members as the notion of "threatening" or "abusive" is not in any sense conditioned.

9. It could encompass the use of language which will be interpreted subjectively by the person to whom the language is directed and could simply arise where one person threatens a particular course of conduct.

10. In this sense a teenage child threatening their parent to behave (misbehave) in a particular way that is unacceptable to the parent could give rise to meeting the first hurdle.

11. The majority decision also noted that the ACTU definition was too uncertain and that access to leave should be limited to dealing with the immediate impact of such violence, such as finding alternative accommodation or attending urgent court hearings. In particular Deputy President Gooley and Commissioner Spencer found:

> *[114] Employees' experiences of domestic violence can have long term effects both physically and psychologically. An employee whilst fit for work may need on-going counselling or a child may need on-going counselling. We accept the submission that while employers have a role in supporting employees who have experienced family and domestic violence, the provision of leave for family and domestic violence should be limited to dealing with the immediate impact of such violence such as finding alternative accommodation or attending urgent court hearings.*

12. Obviously if the clause is further conditioned by a list of activities it is more likely to reflect this outcome but were it not conditioned by a list of activities for the taking of the leave it would become inappropriately generous in terms of section 134.

13. Model term two and three, while constructed in a fashion differently to the ACTU's claim still suffer from some of these concerns around scope as those things articulated as family violence operate with a very low threshold.

14. Model term one's definition of family violence appears to be less troubled by these problems although the inclusion of the words "other behaviour" and the adoption of an "or" in relation to the element of "fear" appear to us to encapsulate elements that were not effectively the focus of the case.

15. If the Commission were minded to keep the phrase "other behaviour" given the open ended nature of this proposition then we believe the element of fearfulness needs to predicated with an "and" rather than an "or".

16. Such a definition seems to set the bar at a point where ordinary robust relationships including arguments and disagreements are not properly comprehended by the definition and therefore would be outside its scope but those elements of behaviour which the experts in the case focussed on are clearly within scope. The inclusion of the notation in model term one is also helpful and can be

included to provide useful guidance for employers and employees and still fits within our amended proposition.

17. It may be prudent that the term "family member" is also defined to provide greater clarity to both employers and employees in understanding their rights and obligations.

18. Certain preliminary questions arise as to the scope of family membership but also whether or not there needs to be an element of the persons living in the same household.

19. In the interests of clarity, some attraction emerges in relation to the definition of "family member" contained in model term two. This said, the adoption of various language in the definition is sociological in nature and may be particularly difficult for an employer and employee to construe with any sense of clarity.

20. The obvious example of this is the phrase "intimate personal relationship". The notion of intimacy would appear to be highly subjective.

21. One of the strengths of the definition in model term two is that is comprehends the notion that a person may be in or may have been in a particular relationship (eg, person's spouse). This temporal consideration would appear to be relevant and practical.

22. We have not formed a concluded view on this issue at this time and still sense that the adoption of language that employers and employees may already be familiar with such as that contained in our previous submissions may still be more appropriate. In other words, a suitably clear and properly contained definition may be elusive. However a clear articulation of circumstances in which the leave can be used will help overcome this challenge. This part of the dialogue can be further explored in the anticipated conferences.

Question 3: parties are asked to consider whether a list of situations in which an employee may access family violence leave should be included in a model term, and if so, which circumstances might be included in such a list?

23. Here the reasons for access are referred to in the model clauses provided by the Background Paper they are included as non-exhaustive examples. This is problematic. Clearly the majority qualified the activities that the leave should be available for.

24. For reasons observed in our previous submission, we see qualification as necessary but also highly desirable (section 134(1)(g)).

25. For reasons set out in our previous submission, we do not accept that any new grant of leave should be available where a pre-existing grant of leave such as personal carer's leave is available and as such any list of activities for taking an additional grant of leave should exclude those circumstances.

26. We maintain a preference for the language set out in our Annexure A clause 1.1 of our previous submission given its clarity and contained scope but also we believe it is important to include the phrase "provided it is impracticable to attend outside work time" which reinforces the immediacy or urgent nature of the undertaking of the activity rather than a mere choice to undertake the activity in work time.

Question 4: Parties are asked to give consideration to the most appropriate terminology for inclusion on the model term

27. The question of nomenclature including phrases such as "victim" or "exposed" etc will depend on whether the circumstances of access to leave are suitably clear. The adoption of language that is the same or similar to section 65 of the Fair Work Act 2009; that is "employee who is experiencing family violence" will work in circumstances where access to the leave is contained to circumstances such as those proposed in our previous submissions. This would enable adoption of language that is the same or similar to section 65 of the Fair Work Act 2009; that is "employee who is experiencing family violence".

28. However if the circumstances in which leave can be accessed are not contained and if access is linked back to a definition of family and domestic violence that is broad, constructs such as "experiencing" become more problematic. We acknowledge that there may be sociological concerns associated with various nomenclatures including the phrase "victim" As such, containing access to the leave to circumstances such as those proposed in our previous submissions would help to overcome the reliance in definitions and terminology as the basis for the entitlement.

Question 5: The model terms have been drafted on the basis that the perpetrators of family violence would not be entitled to take family violence leave. Does any party take a different view?

29. Based on our previous submissions and the formulation of language contained in our Annexure A of our previous submissions it would be apparent that we do not believe that the perpetrator of family violence would be entitled to take any additional grant of leave.

30. This said, we should acknowledge that if the definition of family violence is a particularly loose one there may well be circumstances where parties to a relationship are both perpetrators and victims at the same time. That is to say that one party might very well act in a threatening and abusive way and the other party may retaliate in like fashion and in such a circumstance it would raise the question as to who is the perpetrator or the victim or whether or not both or none are. Again, containing circumstances of access to defined actions or events would be of assistance in clarifying when the leave can be accessed.

Question 6: If the entitlement under the NES to paid personal/carer's leave is extended to allow employees to use it if they are experiencing family violence, should casual employees also be able to access this entitlement? Should casual employees be able to access unpaid family violence leave?

31. The Background Paper sets out the observations made by the majority. In our previous submissions we simply considered what we understood to be the majority's view that all employees should have access to some form of unpaid additional leave.

32. In considering how to respond to the original set of questions posed by the parties we reflected against the various guidance we drew from the *Fair Work Act 2009* generally as set out in our previous submissions to deal with the question of casual employees.

33. We simply note for the present purposes where the *Fair Work Act 2009* grants unpaid leave to casual employees, it does not further refine the definition of casual employee for those purposes.

34. To the extent that this matter needs further dialogue we would pursue that at the scheduled conferences.

Question 7: Should a term providing for employees to take unpaid family violence leave include a cap on the quantum of such leave? Should it accrue from year to year?

35. We have already dealt with this matter at some length in our previous submissions but we make some additional points.

36. We considered at some length whether or not a grant of leave per occasion was an appropriate formulation to adopt. The real difficulty with this is to actually localise the notion of "the occasion". In the context of bereavement it is not particularly difficult to localise the occasion as it arises as a consequence of the bereavement. This is reasonably easy to ascertain as a matter of fact.

37. In the context of behaviour in a personal relationship, the notion of what constitutes "the occasion" may be far more problematic. It might well be that various behaviour of a robust nature does not trigger any particular threshold or it may. This may continue for a period of time and the question arises in that context of what constitutes "the occasion". That is, is the original trigger of family violence the occasion or is it simply every day triggering a new occasion?

38. The lack of clarity and certainty in adopting a 'per occasion' basis lead us, in our previous submissions, to look at a grant of leave per year.

39. This also seemed to accord with usage in the evidence which was helpful in providing guidance in this regard, even if on a limited basis.

40. In our previous submissions we dealt with the question of accrual at some length. We do not see this form of leave as being one that accrues or should accrue.

41. Personal/carer's leave had its accrual genesis in what used to be described as "sick leave". Various schemes evolved over many years of award and legislative history leading to the accrual of sick leave being the norm.

42. There is perhaps an inherent logic in why sick leave might accrue as it is more probable than not that as an employee ages they might be more exposed to illness or injury and therefore in need of extended periods of absence from work that might not have been the case when they were younger.

43. The ultimate expansion of sick leave to include the taking of such leave for caring responsibilities culminating in its contemporary manifestation of personal/carer's leave simply piggy-backs on this long line of sick leave related jurisprudence and rationale.

44. Domestic violence should not be seen to have a similar characterisation (as demonstrated by the evidence in this case).

45. Accordingly, by its nature and also in the context of the leave being unpaid it should not accumulate.

Question 8: Are there any other types of evidence that the Commission should consider?

46. We have dealt with this question in our previous submission and as we have said in that submission the nature of evidence required for the taking of personal leave provides adequate guidance for the taking of any additional grant of leave concerning family violence.

Question 9: Parties are asked to consider whether the Commission can and should include in any model term dealing with family violence a requirement that an employer must keep information about their employee's experience of family violence confidential.

47. It should be said at the outset that there was no evidence put on in the case that suggested there were any practical experiences where employers had inappropriately shared information about family violence.

48. As we said in the case and again in our previous submissions the employer may very well be informed of circumstances that are particularly sensitive for an employee in the ordinary course of the business day.

49. This may very well occur in relation to the taking of personal leave. Where the nature of the malady is highly personal it may introduce concerns for the employee regarding how the employer perceives that. No evidence was brought in the case as to the unworkability of the current notice provisions for personal leave in these situations.

50. We remain troubled in any event as to whether or not the Commission can include these provisions on jurisdictional grounds and we reiterate elements of our submission in the original jurisdictional hearing in that regard.

Section 139

51. Section 139 of the Act is the opening provision in Subdivision B of Part 2-3 and empowers the Commission with discretion[4] to insert terms into modern awards that are *"about"* any of the following matters:

> *(a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and:*
>
> *(i) skill-based classifications and career structures; and*
>
> *(ii) incentive-based payments, piece rates and bonuses;*
>
> *(b) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities;*
>
> *(c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;*
>
> *(d) overtime rates;*
>
> *(e) penalty rates, including for any of the following:*
>
> *(i) employees working unsocial, irregular or unpredictable hours;*
>
> *(ii) employees working on weekends or public holidays;*
>
> *(iii) shift workers;*
>
> *(f) annualised wage arrangements that:*

[4] This discretion is conditioned by section 134 and section 138 of the Act.

(i) have regard to the patterns of work in an occupation, industry or enterprise; and

(ii) provide an alternative to the separate payment of wages and other monetary entitlements; and

(iii) include appropriate safeguards to ensure that individual employees are not disadvantaged;

(g) allowances, including for any of the following:

(i) expenses incurred in the course of employment;

(ii) responsibilities or skills that are not taken into account in rates of pay;

(iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;

(h) leave, leave loadings and arrangements for taking leave;

(i) superannuation;

(j) procedures for consultation, representation and dispute settlement."

52. The initial question that arises for consideration is when a term is *"about"* any of the subject matters prescribed above.

53. The word *"about"* is a preposition which is defined by the Macquarie Dictionary as meaning:

"1. Of, concerning, in regard to... 2. connected with..."[5]

54. However, the power to create terms *"about"* a particular matter should be distinguished from the power to create terms *"with respect to"* or *"in relation to"* a particular matter. The phrases *"with respect to"* and *"in relation to"* have been judicially held to constitute some of the broadest phrases which could denote a relationship between one subject matter and another.[6] The same cannot be said for the word "about".[7]

55. The phrases *"in relation to"*, *"related to"*, *"in respect of"* and the nature of the relationships denoted by those and similar phrase have been repeatedly considered by the courts. The decisions indicate that the words, although of *"broad import"*[8], are not of unlimited scope. As Dawson J pointed out in *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356.

> *The words "in relation to", read out of context, are wide enough to cover every conceivable connection. But those words should not be read out of context, which in this case is provided by the Mining Act 1968 (Q). What is required is a relevant relationship, having regard to the scope of the Act. Where jurisdiction is dependent upon a relation with some matter or thing, something more than a coincidental or*

[5] Macquarie Concise Dictionary, 3rd edition, page 3

[6] See Bank of NSW v the Commonwealth 1947 76 CLR 1 per Latham CJ at 187; Nordland Papier AG v AntiDumping Authority (1999) 93 FCR 454 per Lehane J at 461.

[7] The only judicial analysis that we have been able to identify regarding the meaning of the term "about" simply notes that the term is no broader than the term "with respect to"- see Electrolux Home Products Pty Ltd v Australian Workers' Union (2004) 221 CLR 309 per Gleeson CJ at [11]

[8] O'Grady v Northern Queensland Co Ltd (1990) 169 CLR 356 at 374 (Toohey and Gaudron JJ)

> *mere connection - something in the nature of a relevant relationship - is necessary: see Reg. V Ross-James; Ex parte Green [1984] HCA 82; [1984 HCA 82; (1984) 156 CLR 185, at pp 196-197, 210. [emphasis added]*

56. In *J & G Knowles v Commissioner of Taxation* [2000] FCA 196; (2000) 96 FCR 402 a Full Court of the Federal Court considered whether a particular fringe benefit was provided *"in respect of"* employment. Their Honours pointed out that:

> 22 *The words "in respect of" have no fixed meaning. They are capable of having a very wide meaning denoting a relationship or connection between two things or subject matters.* ***However the words must, as with any other statutory expression, be given a meaning that depends on the context in which the words are found...***
>
> 23 *The AAT was correct in stating that the phrase requires a "nexus, some discernible and rational link, between the benefit and employment". That, however does not take the matter far enough.* ***For what is required is a sufficient link for the purposes of the particular legislation:*** *see* Scully *at [38] to [40].* ***It cannot be said that any causal relationship between the benefit and the employment is a sufficient link...***
>
> 24 *...Whatever question is to be asked, it must be remembered that what must be established is whether there is* ***a sufficient or material, rather than a, causal connection or relationship*** *between the benefit and the employment. [emphasis added]*

57. Ultimately, when determining the extent to which a preposition such as *"about"* operates, the context within which it appears will be critical, just as has been held to be the case with phrases such as *"in relation to"*.[9]

58. In this case, the context within which section 139 operates indicates that the legislature not only deliberately chose the term "about" in section 139, but also intended there to be limits on the extent of the term's operation.

59. This is borne out by an analysis of the entirety of Subdivision B of Part 2-3 of the Act:

(a) Section 139 creates the general power to include certain terms in awards, provided the terms are *"about"* specified subject matters.

(b) Section 140(1) then entitles the Commission to include terms *"relating to"* the conditions of outworkers.

(c) Section 142 then provides that:

> *"A modern award may include terms that are:*
>
> *(a) incidental to a term that is permitted to be included in a modern award; and*
>
> *(b) essential for the purpose of making a particular term operate in a practical way."* (emphasis added)

60. The notion of a term being incidental should be reasonably well settled.

[9] Workers' Compensation Board of Queensland v Technical Products Pty Ltd (1988) 165 CLR 642 per Deane, Dawson and Toohey JJ at 653

61. The meaning of the word *"essential"* imports a high bar; *"...absolutely necessary, indispensible..."*[10]

62. The second limb (practical operation) is more than simply *"operate"* as the word *"operate"* is coloured by the word *"practical"* which means *"...2. consisting of, involving, or resulting from practice or action: a practical application of a rule..."*[11]

63. The following conclusions can be drawn from the above:

    (a) Firstly, it is noteworthy that the Act does not empower the Commission to include terms "about" outworkers, despite the use of the word "about" in the previous subsection. Instead the Act states that the Commission may include terms "relating to" outworkers.

    The choice of different phraseology when describing the scope of the Commission's powers in adjacent sections of the Act (namely, sections 139 and 140), tellingly suggests that the breadth of the powers conferred by sections 139 and 140 differs.

    Given the well documented breadth of the phrase *"relates to"*[12], we submit that the use of the phrase *"about"* in section 139 is intended to have more limited operation than the phrase "relates to" in subsection 140.

    (b) Secondly, the requirement that *"incidental terms"* must be both incidental and also essential for the practical operation of other award terms prior to being included in modern awards stands in contradistinction to the operation of sections 139 and 140 of the Act. Sections 139 and 140 impose no requirement to consider the essentiality of a term prior to its inclusion.

    This difference in approaches necessarily leads to the conclusion that the phrase *"about"* in section 139 requires a more than *"incidental"* connection between an award term and the subject matters listed in section 139, prior to a term's inclusion in an award pursuant to the powers granted in section 139.

64. This *"about"* requirement is stricter than the *"relating to"* requirement which in turn is different from *"incidental and essential"*.

65. Having considered the above, it is submitted that section 139 requires the Commission to characterise the nature of the term sought to be included in a modern award and determine whether the essence of the subject matter of the term is one which falls within the scope of section 139.

66. Section 142 operates with a different requirement; incidental and essential to the practical operation.

67. Accordingly for the Commission to be seized with jurisdiction to exercise its discretion in accordance with section 139 it must ensure that:

    (a) the essence of the subject matter of the term is one which falls within the scope of section 139; or

    (b) alternatively, what is sought is both incidental to a term described at (a) above and is absolutely necessary or else the award cannot operate in a practical way.

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[10] Macquarie Concise Dictionary, 3rd edition, page 377
[11] Macquarie Concise Dictionary, 3rd edition, page 904
[12] See Bank of NSW v the Commonwealth 1947 76 CLR 1 per Latham CJ at 187; Nordland Papier AG v AntiDumping Authority (1999) 93 FCR 454 per Lehane J at 461.

68. It is uncontroversial that the gravamen of the clause is "about" leave and thus permitted by section 134.

69. What is open to question is whether the privacy obligations incidental to the grant of leave are "essential" etc.

70. We submit that they are not and propose to explore this issue further in the conference.

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